FILE COPY

Office Supreme Court, U.S.
NOV 14 1945
CHARLES ELMORE CROPLEY
CLERK

No. 393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

CHRISTINE COLLINS, A. J. CUMMINS, YANCEY LEE CUMMINS AND EDWARD J. MILLER,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR PETITIONERS

JOHN K. SKAGGS,
ALLAN P. DODD, SR.,
Louisville, Kentucky;
MAX O'RELL TRUITT,
MAC ASBILL,
Washington 6, D. C.,
Counsel for Petitioners.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

INDEX

Subject Index

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	3
Statement	4
Specifications of error to be urged	5
Summary of argument	6
Argument	9
Section 203(a) of the Emergency Price Control Act grants to a party the unconditional right to protest "at any time" the legality of a maximum price regulation to which he is "subject"	9
Section 203(e) of the Emergency Price Control Act requires the submission of a protest to a Board of Review	10
Section 204(a) of the Emergency Price Control Act grants to a party the unqualified right to have the dismissal of a protest reviewed by the Emergency Court of Appeals	10
Respondent may not maintain the pending civil action against petitioners under Section 205(e) of the Emergency Price Control Act unless petitioners are "subject" to the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193	11
Rights granted the public under Sections 203(a) and 204(a) of the Emergency Price Control Act are not limited by Section 204(e)(1) of that Act	12
The action of the Emergency Court of Appeals conflicts with the congressional intent in enacting Section 204(d) of the Emergency Price Control Act	13

Page

The suspension of a maximum pricing regulation does not repeal the statutory rights granted the public by Sections 203(a) and 204(a) of the Emergency Price Control Act 14

If General Maximum Price Regulation and Maximum Price Regulation No. 193 were applicable to sales in January, 1943, of warehouse receipts for bulk whiskey, they were not superseded by Maximum Price Regulation No. 445 16

Conclusion 18

Appendix 20

CITATIONS

Cases:

Bowles v. *Indianapolis Glove Company*, 150 F. (2d) 597 10

Bowles v. *Seminole Rock & Sand Company*, 324 U. S. —, decided June 4, 1945 18

Cummins Distilleries Corp. v. *Brown*, 56 F. Supp. 941 15

Krause Milling Company v. *Bowles*, 148 F. (2d) 845 10, 17, 18

Thomas Paper Stock Company v. *Bowles*, 148 F. (2d) 831 10, 17

United States v. *Hark*, 320 U. S. 531, 536 8, 14

United States v. *Johnson*, 53 F. Supp. 167 15, 16

Yakus v. *United States*, 321 U. S. 414 7, 10, 16

Statutes and Regulations:

Emergency Price Control Act:

Section 1(a) 20

Section 2(a) 21

Section 203(a) and (c) 21

Section 204(a), (c), (d) and (e) 22, 23, 24

Section 205(e) 25

General Maximum Price Regulation, 7 Fed. Reg. 3153 3

Judicial Code, Section 240 (28 U. S. C., Section 347) 2

Maximum Price Regulation No. 193, 7 Fed. Reg. 6006 3, 8

Page

Maximum Price Regulation No. 445, 8 Fed. Reg. 11161 3, 8, 16
Procedural Regulation No. 1:
Section 35(b) 26
Section 43 27
Section 50 27
Rev. Stat. Sec. 13, as amended by Act of March 22, 1944, c. 123, 58 Stat. 118 (1 U. S. C., Supp. IV, Sec. 29) 15
Supplementary Order No. 40, 8 Fed. Reg. 4325 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 393

CHRISTINE COLLINS, A. J. CUMMINS, YANCEY LEE CUMMINS AND EDWARD J. MILLER,

Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR PETITIONERS

Opinion Below

No opinion was rendered by the United States Emergency Court of Appeals.

Jurisdiction

The judgment of the United States Emergency Court of Appeals was entered August 9, 1945 (R. 36). The petition for a writ of certiorari was filed August 31, 1945, and

was granted on November 5, 1945. Jurisdiction of this Court is conferred by Section 204(d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App. Supp. IV, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2nd Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., making applicable Section 240 of the Judicial Code, as amended (28 U. S. C., Sec. 347).

Questions Presented

1. Whether Section 203(a) of the Emergency Price Control Act, as amended, authorizes the filing of a protest by petitioners with respondent on May 4, 1945, to contest the applicability and validity of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales by petitioners in January, 1943, of warehouse receipts for bulk whiskey.

2. Whether Section 204(a) of the Emergency Price Control Act, as amended, authorizes the filing of a complaint by petitioners with the United States Emergency Court of Appeals to review the action of respondent in dismissing, on procedural grounds, their protest contesting the applicability and validity of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales by petitioners in January, 1943, of warehouse receipts for bulk whiskey.

3. Whether Section 204(e)(1) of the Emergency Price Control Act, as amended, by implication limited the unqualified right of petitioners under Section 203(a) of the Act to protest the applicability and validity of pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 merely because a possible—not an absolute—right is given petitioners under Section 204(e)(1)

of the Act to file a complaint with the United States Emergency Court of Appeals within five days after judgment against them in a pending civil action, but which possible right is subject to the absolute discretion of the United States District Court.

4. Whether Maximum Price Regulation No. 445, which became effective August 14, 1943, superseded the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales of warehouse receipts for bulk whiskey by petitioners in January, 1943, or over seven months *before* Maximum Price Regulation No. 445 became effective.

5. Whether, when penalties are sought to be enforced against petitioners in a civil enforcement action for alleged violations of superseded price regulations, petitioners have the right to contest the applicability and validity of the superseded price regulations by filing a protest with respondent under Section 203(a) of the Emergency Price Control Act, as amended, and thereafter by filing a complaint with the United States Emergency Court of Appeals under Section 204 (a) of the Act to review the action of respondent on the protest.

Statutes and Regulations Involved

The pertinent provisions of the Emergency Price Control Act, as amended, and of Procedural Regulation No. 1 issued by respondent appear in the Appendix, *infra*, p. 20. The Maximum Price Regulations involved in this proceeding are: General Maximum Price Regulation, 7 Fed. Reg. 3153; Maximum Price Regulation No. 193, 7 Fed. Reg. 6006, and Maximum Price Regulation No. 445, 8 Fed. Reg. 11161.

Statement

In June, 1943, respondent instituted against petitioners and others in the United States District Court for the Western District of Kentucky a civil action to recover treble damages amounting to $6,799,101.51 for alleged sales in 1942 and 1943 of whiskey at prices in excess of the maximum ceiling prices prescribed by General Maximum Price Regulation and Maximum Price Regulation No. 193 (R. 15-16, 23). The civil action was begun under authority of Section 205(e) of the Emergency Price Control Act and is still awaiting trial. Petitioners were stockholders in the Cummins Distilleries Corporation and received warehouse receipts covering bulk whiskey upon the dissolution of the Corporation in December, 1942 (R. 22). These warehouse receipts devolved upon petitioners by operation of law and were sold by them between January 4 and 9, 1943, upon the belief that they were "securities" expressly exempt from the pricing provisions of General Maximum Price Regulation and not covered by Maximum Price Regulation No. 193 as in effect during January, 1943.

On May 4, 1945, petitioners filed their protest with respondent, objecting to the applicability and validity of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales by petitioners of warehouse receipts for bulk whiskey in January, 1943 (R. 2, 21). The protest was filed under authority of Section 203(a) of the Emergency Price Control Act. On June 2, 1945, respondent dismissed the protest for the stated reason that it did not comply with Section 203(a) of the Act (R. 22), and in so doing ignored the express provisions of Section 203(c) of the Act by failing to refer the protest, as requested by petitioners in their protest (R. 2), to a Board of Review before denying same. Such action by respondent also ignored Sections 35(b), 43 and

50 of Procedural Regulation No. 1 issued by him (*Infra*, pp. 20).

On June 22, 1945, petitioners duly filed their complaint with the Emergency Court of Appeals, as authorized by Section 204(a) of the Act, to review the action of respondent in dismissing their protest (R. 1-19). Respondent filed a motion to dismiss the complaint on the sole ground that "said complaint fails to state a claim upon which relief can be granted" (R. 20). On August 9, 1945, the Emergency Court of Appeals entered an order dismissing the complaint but filed no opinion or made any statement of the reasons for its action other than to state that it was "without jurisdiction to entertain the complaint" (R. 36).

Specification of Error to Be Urged

The United States Emergency Court of Appeals erred:

1. In dismissing the complaint filed by petitioners under Section 204(a) of the Emergency Price Control Act, as amended, to review the prior action of respondent in dismissing their protest on procedural grounds.

2. In failing to hold that petitioners had the unqualified statutory right under Section 203(a) of the Emergency Price Control Act to file a protest in May, 1945, attacking the applicability and validity of pricing provisions, in General Maximum Price Regulation and Maximum Price Regulation No. 193, which respondent was and is seeking to enforce against petitioners in a civil enforcement action for treble damages now pending in the United States District Court for the Western District of Kentucky.

3. In failing to hold that petitioners had the unqualified statutory right under Section 204(a) of the Emergency Price Control Act, as amended, to file their complaint with the United States Emergency Court of Appeals to review

the action of respondent in dismissing their protest duly filed with respondent under authority of Section 203(a) of the Act aforementioned.

4. In failing to hold that respondent violated the mandatory provision of Section 203(c) of the Emergency Price Control Act and his own regulations by omitting to comply with their request that their protest be referred to a Board of Review.

5. In failing to hold that Section 204(e) (1) of the Emergency Price Control Act, as amended, does not limit the statutory right of petitioners to protest the applicability and validity of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales of warehouses receipts for bulk whiskey by petitioners in January, 1943, and does not expressly, or by implication, repeal the absolute right to protest granted petitioners by Section 203(a) of the Act.

6. In failing to hold that no claim by respondent of mere administrative inconvenience can justify the deprivation by the Court, through a strained construction of Section 204(e)(1) of the Emergency Price Control Act, of the absolute right of petitioners to protest the validity of pricing regulations under Section 203(a) of the Act and to have dismissal of their protest reviewed by filing a complaint with the Emergency Court of Appeals under Section 204(a) of the Act.

7. In failing to grant the relief sought by petitioners in their complaint.

8. In holding that the Court was "without jurisdiction to entertain the complaint."

Summary of Argument

Section 203(a) of the Emergency Price Control Act, as amended, bestows upon parties the unconditional right to

protest "at any time" the validity and applicability of maximum price regulations to which they are "subject." Within the meaning of Section 203(a) parties are "subject" to the provisions of maximum price regulations which are sought to be enforced against them to collect treble damages for alleged violations of the ceiling prices prescribed by such regulations. Upon dismissal, on procedural grounds, by the Price Administrator of their protest attacking the validity and applicability of the pricing regulations relied upon by the Price Administrator in a treble damage action, parties have an unqualified right, under Section 204(a) of the Act, to file a complaint with the Emergency Court of Appeals to review such action of respondent. In *Yakus* v. *United States*, 321 U. S. 414 this Court said (p. 437):

> The Emergency Court has power to review . . . any procedural error appropriately raised in the course of the proceedings.

The unconditional rights of parties to protest the validity and applicability of maximum pricing regulations under Section 203(a) of the Act, and to appeal from the decision of the Price Administrator by filing a complaint under Section 204(a) of the Act with the Emergency Court of Appeals, are in no way limited, abridged or repealed by the provisions of Section 204(e) of the Act, which latter Section merely gives to parties a cumulative, additional protection, by permitting the filing of a complaint with the Emergency Court of Appeals, upon leave obtained from the United States District Court, within five days *after* judgment against them in a civil proceeding. Otherwise to construe Section 204(e) will conflict with the Congressional intent in enacting Section 204(d) of the Act vesting the Emergency Court of Appeals with sole jurisdiction to decide the validity of maximum pricing regulations, and may have the effect

of wholly depriving parties of any right whatsoever to protest pricing regulations or to have the Emergency Court of Appeals review adverse action by the Price Administrator with respect to the applicability and validity of such regulations.

Even if General Maximum Price Regulation and Maximum Price Regulation No. 193 were applicable to sales of warehouse receipts for bulk whiskey and were superseded by Maximum Price Regulation No. 445, this did *not* affect a repeal of the statutory rights granted the public by Sections 203(a) and 204(a) of the Emergency Price Control Act, and under the principle announced in *United States* v. *Hark*, 320 U. S. 531, 536, these rights may be exercised by protest to the Price Administrator and appeal therefrom to the Emergency Court of Appeals when the Price Administrator seeks to collect treble damages from parties based upon the contention that parties have violated the ceiling prices prescribed by the superseded regulations.

If General Maximum Price Regulation and Maximum Price Regulation No. 193 were applicable to sales in January, 1943, of warehouse receipts for bulk whiskey, they were *not* superseded by Maximum Price Regulation No. 445 which became effective over *seven months after* petitioners sold their warehouse receipts. Section 7.4a of Maximum Price Regulation No. 445 expressly continued in effect General Maximum Price Regulation and Maximum Price Regulation No. 193 to provide maximum ceiling prices for sellers for whom no maximum ceiling prices were provided in Maximum Price Regulation No. 445. Obviously, Maximum Price Regulation No. 445 prescribed no ceiling prices for sales of warehouse receipts for bulk whiskey, made seven months *before* Maximum Price Regulation No. 445 became effective. Petitioners contend in their complaint (R. 5) that neither General Maximum Price Regula-

tion, Maximum Price Regulation No. 193 nor any other regulation *in effect during January, 1943*, prescribed any maximum ceiling prices applicable to the sale of warehouse receipts for bulk whiskey.

ARGUMENT

Section 203(a) of the Emergency Price Control Act grants to a party the unconditional right to protest "at any time" the legality of a maximum price regulation to which he is "subject."

The protest in the instant matter was filed as authorized by Section 203(a) of the Emergency Price Control Act, which section provides that

> "*At any time* after the issuance of any regulation or order under section 2, or in the case of a price schedule, *at any time* after the effective date thereof * * * any person *subject to* any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision * * *" (Italics supplied).

At the time the protest was filed in May 1945, there was (and now is) pending against petitioners and others, in the United States District Court for the Western District of Kentucky, a civil action instituted in June, 1943, by respondent to recover treble damages amounting to $6,799,101.51 for alleged sales in 1942 and 1943 of whiskey at prices in excess of the maximum ceiling prices prescribed by General Maximum Price Regulation and Maximum Price Regulation No. 193. Obviously, if there is any liability on the part of petitioners for such alleged sales in violation of maximum ceiling prices, it must be because petitioners *were and are* "subject" to the two regulations aforementioned. Hence the protest was properly filed under Section 203(a)

of the Act which authorizes the filing of a protest "at any time" after the issuance of a regulation by any person "subject" to any provision of such regulation. *Bowles* v. *Indianapolis Glove Company*, 150 F. 2d 597, 601(5).

Section 203(c) of the Emergency Price Control Act requires the submission of a protest to a Board of Review.

In dismissing the protest respondent ignored the mandatory provision of Section 203(c) of the Act by failing to refer the protest, as requested by petitioners in their protest (R. 2), to a Board of Review before denying same. Such action by respondent also ignored Sections 35(b), 43 and 50 of Procedural Regulation No. 1 issued by him (*Infra*, p. 26).

Section 204(a) of the Emergency Price Control Act grants to a party the unqualified right to have the dismissal of a protest reviewed by the Emergency Court of Appeals.

The language of Section 204(a) is free from any ambiguity. It gives petitioners an unqualified right to file a complaint to review the denial of their protest. See *Yakus* v. *United States*, 321 U. S. 414, 437. Respondent filed a motion to dismiss the complaint in the Emergency Court of Appeals and in his memorandum in support of the motion relied upon the prior decision of the Emergency Court of Appeals in *Krause Milling Company* v. *Bowles*, 148 F. 2d 845. The *Krause* case was decided by the Emergency Court of Appeals shortly after its decision in *Thomas Paper Stock Company* v. *Bowles*, 148 F. 2d 831, and merely follows the decision in the *Thomas* case. A writ of certiorari was granted in the *Thomas* case, No. 67, to review the dismissal of a complaint filed with the Emergency Court under Section 204(a) and is now awaiting argument.

Respondent may not maintain the pending civil action against petitioners under Section 205(e) of the Emergency Price Control Act unless petitioners are "subject" to the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193.

Section 205(e) of the Act authorizes respondent to institute a civil action, such as is *now pending* against petitioners, to collect treble damages against a person selling a commodity at a price in excess of maximum ceiling prices established by regulations of respondent, and such a suit must be brought within one year from the date of the occurrence of the violation. In the instant matter, action was instituted by respondent in the United States District Court for the Western District of Kentucky in June, 1943, to recover $6,799,101.51 from petitioners and others for alleged sales at prices in excess of maximum ceiling prices on whiskey established by General Maximum Price Regulation and Maximum Price Regulation No. 193. Unless petitioners are now "subject" to the provisions of the two price regulations aforementioned, within the meaning of Section 203(a) of the Act granting the right to protest, it must follow that they are *not* now "subject" to the provisions of Section 205(e) of the Act imposing liability for treble damages and that the treble damage action pending against petitioners in Kentucky must be dismissed because petitioners are no longer subject to the regulations relied upon by respondent in his enforcement action. Obviously, there is no basis for an interpretation of Section 203(a) different from that of Section 205(e). In other words, petitioners cannot on one hand be considered as *subject to* the pricing provisions of General Maximum Price Regulation No. 193 for the purpose of liability for treble damages and, on the other hand, be treated as *not subject to* the same regulations for the pur-

pose of filing a protest under Section 203(a) and having adverse action thereon reviewed by the Emergency Court of Appeals under Section 204(a) of the Act.

Rights granted the public under Sections 203(a) and 204(a) of the Emergency Price Control Act are not limited by Section 204(e)(1) of that Act.

The unqualified rights of petitioners to file a protest with respondent under Section 203(a) of the Act and to appeal from his decision thereon to the Emergency Court of Appeals by filing a complaint under Section 204(a) are in no way abridged by the provisions of Section 204(e) of the same Act. The latter Section merely gives petitioners a possible, additional protection by permitting the filing of a complaint with the Emergency Court of Appeals upon leave obtained from the United States District Court within five days *after judgment* against them in the pending civil action. This cumulative remedy is conditional and in the discretion of the District Court since Section 204(e) does not bestow upon a party an unqualified right to file a complaint with the Emergency Court of Appeals. In its prior decisions relied upon by respondent, the Emergency Court of Appeals has been guilty of judicial legislation in limiting the unconditional right of parties to file a protest under Section 203(a) and to have adverse action thereon reviewed by complaint filed under Section 204(a). It is believed that this Court will correct the prior errors of the Emergency Court of Appeals in its decision upon review of the *Thomas Paper Stock* case, Docket No. 67. As the dissenting opinion of Justice Laws in the *Thomas* case so forcefully points out, the prior opinions of the Emergency Court, limiting the right of protest under Section 203(a) and review of adverse rulings under Section 204 (a), are erroneous and in direct violation of the clear wording of the statute.

The action of the Emergency Court of Appeals Conflicts with the Congressional intent in enacting Section 204(d) of the Emergency Price Control Act.

Under Section 204(d) of the Emergency Price Control Act, as amended, *only* the Emergency Court of Appeals may decide the legality of pricing regulations issued by respondent. If parties may not (a) file a protest to question the legality of pricing regulations which have been superseded but which superseded regulations are the basis of a claim for treble damages as in the instant matter and (b) have action on their protest reviewed by the Emergency Court of Appeals, then, should the District Court *after judgment* against defendants and upon application by defendants under Section 204(e) (1) of the Act *not* permit the filing of a complaint with the Emergency Court of Appeals, the result will be that the parties are deprived of *all* right to have the validity of the regulations contested in the *only court* having jurisdiction to decide the question. Certainly such a result was not intended by the Congress in enacting Sections 204(d) and 204(e)(1), the latter of which sections merely gives to a party a cumulative, additional means of protection and does not expressly, or by implication, repeal the absolute rights to protest, and have adverse action thereon reviewed by the Emergency Court of Appeals, granted by Sections 203(a) and 204(a) of the Act.

It is of the utmost importance to the public that this Court not permit the Emergency Court of Appeals, under the guise of judicial legislation, to deprive parties of their unqualified statutory rights (a) to protest the applicability and validity of maximum pricing regulations under Section 203(a) and (b), to have action on the protest reviewed by the Emergency Court of Appeals under Section 204(a) merely because a possible—not an absolute—right is given

the parties under Section 204(e)(1) to file a complaint before the Emergency Court of Appeals *after judgment* in a civil enforcement action, but which possible right is subject to the absolute discretion of the District Court. Otherwise, Section 204(e)(1) instead of providing an additional cumulative means of protection may have the effect of wholly depriving parties of any right whatsoever to protest pricing regulations or to have the Emergency Court of Appeals review adverse action by respondent with respect to the applicability and validity of such regulations.

No claim by the respondent of mere administrative inconvenience can possibly justify the deprivation by the Emergency Court of Appeals, through a strained construction of Section 204(e)(1), of the absolute rights of parties to protest, and have reviewed by the Emergency Court, issues with respect to the applicability and validity of regulations. These rights are given the parties by Sections 203(a) and 204(a) of the Act. Substantive rights may not be subordinated to administrative convenience.

The suspension of a maximum pricing regulation does not repeal the statutory rights granted the public by Sections 203(a) and 204(a) of the Emergency Price Control Act.

Under the principle announced in *United States* v. *Hark*, 320 U. S. 531, 536, a protest may be employed under Section 203(a) of the Emergency Price Control Act to secure a determination as to the applicability and validity of maximum pricing regulations, which have been superseded prior to the filing of a protest, where an enforcement action for treble damages is pending, based upon the superseded regulations, at the time the protest is filed. Suspension or revocation of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193, as contended by respondent, would not repeal Sections

203(a) and 204(a) of the Act. The statute, not the regulations issued by respondent, creates the right to protest and to review an adverse ruling thereon by complaint to the Emergency Court of Appeals.

Since the Act, Section 205(e), creates liability for penalties upon violation of maximum pricing regulations, *Cummins Distilleries Corporation* v. *Brown*, 56 F. Supp. 941, and enforcement of such liability after repeal of a pricing regulation is permitted under *United States* v. *Hark, supra*,[1] it must follow that Section 203(a) of the same Act permits protest of the applicability and validity of suspended or repealed pricing regulations and that Section 204(a) permits filing of a complaint with the Emergency Court of Appeals to review the action of respondent upon a protest when an enforcement action is instituted, as in the instant matter, to collect enormous penalties under the Act.

On April 2, 1943, respondent issued Supplementary Order No. 40. This order provides (8 Fed. Reg. 4325):

> 1305.54. *Effect of repeal, revocation, amendment or other modification of price regulations.* (a) The repeal, revocation, amendment or other modification of a price regulation or any part thereof shall not have the effect to release or extinguish any penalty or liability incurred under such price regulation unless otherwise expressly provided but such price regulation or part thereof shall be treated as remaining in force for the purpose of allowing or sustaining any proper suit, action, prosecution or proceeding with respect to such penalty or liability.

Assuming, but not conceding, the power of respondent to issue the above order, which power is denied in *United*

---

[1] See Rev. Stat., sec. 13, as amended by Act of March 22, 1944, c. 123, 58 Stat. 118 (1 U. S. C., Supp. IV, sec. 29) permitting prosecutions after the lapse of a temporary statute (such as the Emergency Price Control Act) for offenses committed prior to its expiration.

States v. *Johnson*, 53 F. Supp. 167, it must follow that if repealed regulations may be treated "as remaining in force for the purpose of allowing or sustaining any proper suit, action, prosecution or proceeding with respect to such penalty or liability," then, for there to be any semblance of due process under the Fifth Amendment parties against whom a civil action for penalties is instituted must have the rights of protection granted them, by Sections 203(a) and 204(a) of the Emergency Price Control Act, to protest the applicability and validity of the regulations and to have the Emergency Court review the ruling of respondent upon the protest, since the Emergency Court *alone* is vested with jurisdiction to determine the validity of maximum pricing regulations. See *Yakus* v. *United States*, 321 U. S. 414.

If the contentions of petitioners are sound, a decision of respondent or of the Emergency Court of Appeals holding the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 inapplicable to, and that the regulations prescribed no ceiling prices on, sales of warehouse receipts for bulk whiskey by petitioners in January, 1943, will enable the latter to introduce the ruling in evidence as a complete defense at the trial in the enforcement action pending in Kentucky.

If General Maximum Price Regulation and Maximum Price Regulation No. 193 were applicable to sales in January, 1943, of warehouse receipts for bulk whiskey, they were not superseded by Maximum Price Regulation No. 445.

Maximum Price Regulation No. 445 (8 Fed. Reg. 11161) became effective August 14, 1943, or over *seven months after* petitioners sold warehouse receipts covering bulk whiskey in January, 1943. Clearly, the maximum ceiling prices prescribed by M. P. R. 445 could not apply to

actual sales and deliveries made seven months *before* its issuance.

Section 2.1(b) of M. P. R. 445 provides that M. P. R. 445 supersedes General Maximum Price Regulation and Maximum Price Regulation No. 193 "except as otherwise provided in this regulation". The exception is contained in Section 7.4a of M. P. R. 445 which provides:

> Maximum prices for sellers for whom no specific provision is made. The maximum price for any seller of distilled spirits or wine for whom no maximum price is provided in this regulation and who is otherwise unable to determine a maximum price hereunder, shall be his maximum price established by whichever of the following regulations of the Office of Price Administration is applicable: Maximum Price Regulation 193; General Maximum Price Regulation; National Regional or District Restaurant Maximum Price Regulations.

In other words, Section 7.4a of M. P. R. 445 expressly continued in effect General Maximum Price Regulation and Maximum Price Regulation No. 193 to provide maximum prices for any seller for whom no maximum ceiling price was provided in M. P. R. 445. Clearly, General Maximum Price Regulation and Maximum Price Regulation No. 193, *if applicable to sales of warehouse receipts for bulk whiskey in January, 1943*, were continued in effect to include such sellers as petitioners in the instant matter because their sales of warehouse receipts for bulk whiskey were made seven months *before* M. P. R. 445 became effective, and petitioners were "subject" to the former two regulations when their protest was filed with respondent on May 4, 1945. Hence, the principle (believed to be erroneous) announced by the Emergency Court of Appeals in *Thomas Paper Stock Company* v. *Bowles*, 148 F. 2d 831, in which a writ of certiorari has been granted, as No. 67, and *Krauss Milling Co.*

v. *Bowles;* 148 F. 2d 845 can have no application to the facts of the pending case. If "subject" to General Maximum Price Regulation and Maximum Price Regulation No. 193 on May 4, 1945, with respect to sales in January, 1943, of warehouse receipts for bulk whiskey, it must follow that petitioners had the unqualified rights under Section 203(a) and 204(a) of the Act to protest the applicability and validity of these regulations before respondent and to appeal from his dismissal of their protest by filing a complaint with the Emergency Court of Appeals. Petitioners contend (R. 5) that neither General Maximum Price Regulation, Maximum Price Regulation No. 193 nor any other regulation prescribed any ceiling price for sales in January, 1943, of warehouse receipts for bulk whiskey. If this is true, there is no basis for the pending treble damage action.

Conclusion

This Court will not, of course, decide any question here as to the constitutionality or statutory validity of General Maximum Price Regulation or Maximum Price Regulation No. 193, matters that must in the first instance be presented, and *actually were presented* in the instant case, to the Emergency Court of Appeals and that court erroneously dismissed the complaint and refused to decide the issues. *Bowles* v. *Seminole Rock & Sand Company*, 324 U. S. —, decided June 4, 1945, 89 L. Ed. 1186.

The decision of the court below dismissing the complaint is erroneous and should be reversed.

Respectfully submitted,

JOHN K. SKAGGS,
ALLAN P. DODD, SR.,
Louisville, Kentucky;
MAX O'RELL TRUITT,
MAC ASBILL,
Washington 6, D. C.,
Counsel for Petitioners.

October, 1945.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., are as follows:

Section 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increase in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work to-

ward a stabilization of prices, fair and equitable wages, and cost of production.

. . . . . .

Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.

. . . . . .

Sec. 203. (a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.

. . . . . .

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs: Provided, however, That, upon the request of the protestant, any protest filed in accordance with subsection (a) of this section after September 1, 1944, shall, before denial in whole or in part, be considered by a board of review consisting of one or more officers or employees of the Office of Price Administration designated by the Administrator in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees

thereof, and shall provide that, upon the request of the protestants and upon a showing that material facts would be adduced thereby, subpoenas shall issue to procure the evidence of persons, or the production of documents, or both. The Administrator shall cause to be presented to the board such evidence, including economic data in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board, and the board shall make written recommendations to the Price Administrator. The protestant shall be informed of the recommendations of the board and, in the event that the Administrator rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection.

* * * * * * *

Sec. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding:

* * * * * * *

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a

judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and *within five days after judgment in any civil* or criminal *proceeding*, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and sub-

stantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203(a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection. (Emphasis supplied)

Section 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling

of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

* * * * * * *

Sections 35(b), 43 and 50 of Procedural Regulation No. 1 issued by respondent provide as follows:

Section 35(b) *Request for consideration by a board of review.* A protestant who wishes his protest considered by a board of review must specifically so request, indicating, if he wishes to offer oral argument, the order of his preference as to (1) argument before a board of review in Washington, D. C.; (2) argument before a subcommittee consisting of one member of a board at a location named by him. Section 45 of this revised procedural regulation sets forth the considerations which will be determinative in the decision as to where oral argument may be heard. The request for consideration by a board of review must be made either in the protest or in an amendment thereto filed

within fifteen days of the date the protest is filed. Such an amendment shall be deemed filed within the fifteen day period if it is received by the Secretary, Office of Price Administration, Washington, D. C., or by the director of the appropriate territorial office, no later than the fifteenth day after the protest was filed. Further provisions with respect to proceedings before a board of review are to be found in sections 43 to 50, inclusive, of this regulation.

Section 43. *Right to consideration by a board of review.* Under section 203(c) of the Act, a protest filed after September 1, 1944 must, upon the protestant's request, be considered by a board of review before it can be denied in whole or in part. Consideration of the record in a protest proceeding by a board of review is undertaken for the purpose of reconsidering the provision or provisions of the maximum price regulation protested and recommending action relative thereto to the Administrator. A board of review considers the protest upon the basis of the record which has been developed in the proceedings. Protestant is accorded an opportunity to present oral argument to a board, upon the basis of the objections raised in the protest and the evidence in the record, and guided by the explanatory statement of the issues in the notice of consideration by a board of review. Section 34 of this revised procedural regulation explains the nature of the record in the proceedings. Section 35(b) explains the nature of such a request and states the time within which it must be filed.

Section 50. Action by Administrator after receipt of board of review's recommendations. After receipt of a board of review's recommendations as to the disposition of the protest, the Administrator shall, within a reasonable time, grant or deny the protest in whole or in part.